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12 UNITED STATES DISTRICT COURT  
 13 NORTHERN DISTRICT OF CALIFORNIA  
 14 SAN FRANCISCO DIVISION

15 IN RE: CATHODE RAY TUBE (CRT)  
 16 ANTITRUST LITIGATION

Master File No. 3:07-cv-05944-SC  
 MDL No. 1917

17 This Document Relates to:

18 *Electrograph Systems, Inc., et al. v. Hitachi,*  
 19 *Ltd., et al.*, No. 11-cv-01656;

20 *Alfred H. Siegel, as Trustee of the Circuit*  
*21 City Stores, Inc. Liquidating Trust v.*  
*Hitachi, Ltd., et al.*, No. 11-cv-05502;

22 *Best Buy Co., Inc., et al. v. Hitachi, Ltd., et*  
*al.*, No. 11-cv-05513;

23 *Target Corp, et al. v. Chunghwa Picture*  
*Tubes, Ltd., et al.*, No. 11-cv-05514;

25 *Interbond Corporation of America v.*  
*Hitachi, et al.*, No. 11-cv-06275;

26 *Office Depot, Inc. v. Hitachi Ltd., et al.*, No.  
 27 11-cv-06276;

28 *CompuCom Systems, Inc. v. Hitachi, Ltd., et*

**DIRECT ACTION PLAINTIFFS'**  
**RESPONSE TO THOMSON'S AND**  
**MITSUBISHI'S OBJECTIONS TO THE**  
**INTERIM SPECIAL MASTER'S**  
**REPORT AND RECOMMENDATION**  
**REGARDING DIRECT ACTION**  
**PLAINTIFFS' MOTION FOR LEAVE**  
**TO FILE AMENDED COMPLAINTS**

1       *al.*, No. 11-cv-06396;  
2       *Costco Wholesale Corporation v. Hitachi,*  
3       *Ltd., et al.*, No. 11-cv-06397;  
4       *P.C. Richard & Son Long Island*  
5       *Corporation, et al., v. Hitachi, Ltd., et al.*,  
6       No. 12-cv-02648;  
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1 Pursuant to the Court's June 18, 2012, Order Amending Order Appointing Special Master,  
 2 the undersigned Direct Action Plaintiffs ("DAPs") hereby file this response to Thomson  
 3 Consumer Electronics, Inc., and Thomson S.A.'s (together, "Thomson") and Mitsubishi Electric  
 4 US, Inc., and Mitsubishi Digital Electronics Americas, Inc.'s (together, "Mitsubishi") Objections  
 5 to the Special Master's June 28, 2013, Report and Recommendation, which recommended that  
 6 the Court grant in its entirety the DAPs' Motion for Leave to File Amended Complaints.

7 **INTRODUCTION**

9 Interim Special Master Quinn's Report and Recommendation (the "R&R") is based on a  
 10 well-reasoned analysis of the relevant law and the procedural posture of this case:

11 *The burden on showing prejudice from a proposed amendment  
 12 rests on the non-moving party. . . . There is simply no persuasive  
 13 basis on which to find that Thomson has satisfied its burden to  
 show that it would be unduly prejudiced by allowing the requested  
 amendments.*

14 Report and Recommendation at 4, 7.

15 *Mitsubishi is not in a materially different position now than it was  
 16 when Judge Legge made his recommendation. For these reasons,  
 17 Mitsubishi has not satisfied its burden to demonstrate undue  
 prejudice.*

18 *Id.*

19 *No persuasive reason is presented for coming to a conclusion  
 20 different as to Mitsubishi and Thomson than Judge Legge did as to  
 Mitsubishi last year.*

21 *Id.* at 5.

22 *DAPs reasonably assert that they were performing due  
 23 diligence . . . . The mere speculation that they might have  
 completed that review and filed this motion 2-3 months sooner is  
 not an adequate basis to demonstrate undue delay.*

24 *Id.* at 6.

25 Thomson and Mitsubishi nevertheless object, and in doing so disregard these definitive  
 26 and persuasive conclusions and rehash unsupported arguments that have now twice been rejected  
 27 by the Special Masters. The proposed amendments—many of which are unopposed by any of the

existing or putative Defendants<sup>1</sup>—readily satisfy the liberal standard for granting leave to amend, and DAPs need not repeat arguments already thoroughly briefed and presented before the Interim Special Master. As the Interim Special Master explained, Thomson and Mitsubishi failed to carry their burden of establishing undue prejudice or undue delay related to their addition as defendants in the DAP actions. The Court should adopt the R&R in its entirety and grant the DAPs leave to add Thomson and Mitsubishi as defendants; to add Videocon Industries, Ltd., as a non-party co-conspirator; to add additional allegations relevant to *American Pipe*, cross-jurisdictional, and Government Action tolling; to delete certain paragraphs in certain DAP complaints; and, in the case of Costco, to add certain Samsung SDI entities<sup>2</sup> as defendants and certain Panasonic entities<sup>3</sup> as non-party co-conspirators.

## ARGUMENT

### I. Legal Standard

The Interim Special Master’s determination of whether to grant the motion to amend is a procedural decision that this Court reviews for abuse of discretion. *See* Dkt. No. 1534 at 3 (“The Court reviews the Special Master’s factual findings for clear error, his legal conclusions *de novo*, and his procedural decisions for abuse of discretion.”) (citations omitted); Dkt. No. 302 at 6 (“The Court will set aside the Special Master’s ruling on a procedural matter only for an abuse of discretion.”); Fed. R. Civ. P. 53(f)(3)–(4) (same); *see also* Thomson Obj. at 3 (“The decision to grant a motion to amend is reviewed for ‘abuse of discretion.’”).

Abuse of discretion is a “significantly deferential” standard. *United States v. Hinkson*,

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<sup>1</sup> In the proceedings before the Interim Special Master, the Samsung SDI Defendants opposed Costco’s motion to add those entities as defendants in Costco’s individual action. However, Samsung SDI has dropped its opposition by failing to object to the Special Master’s recommendation that Costco’s motion be granted. With the exception of the ruling on the DAPs’ request to add Thomson and Mitsubishi as defendants, all aspects of the R&R are unopposed and should be adopted. And for the reasons explained below, the R&R as to Thomson and Mitsubishi should also be approved.

<sup>2</sup> The Samsung SDI entities are: Samsung SDI Co., Ltd., Samsung SDI America, Inc., Samsung SDI Mexico S.A. de C.V., Samsung SDI Brazil Ltda., Shenzhen Samsung SDI Co., Ltd., Tianjin Samsung SDI Co., Ltd., and Samsung SDI (Malaysia) Sdn. Bhd.

<sup>3</sup> The Panasonic entities are: Panasonic Corp., Panasonic Corp. of North America, MT Picture Display, Co., Ltd., Matsushita Electronic Corp. (Malaysia) Sdn. Bhd. and Panasonic Consumer Electronics Co.

1 585 F.3d 1247, 1262 (9th Cir. 2009) (en banc). Neither Thomson nor Mitsubishi dispute that the  
 2 Interim Special Master applied the “appropriate [legal] standards for evaluating a motion for  
 3 leave to amend.” *See* Thomson Obj. at 4; *see also* Mitsubishi Obj. at 4 (reciting the same legal  
 4 standard as the Interim Special Master). Thus, the *only issue* on review is whether the Interim  
 5 Special Master’s conclusions “were illogical, implausible, or without support in inferences that  
 6 may be drawn from facts in the record.” *Hinkson*, 585 F.3d at 1264. Of course, as outlined in  
 7 great detail in the R&R, as well as the DAPs’ motion and supporting papers, the Interim Special  
 8 Master’s application of the proper legal standard was logical, plausible, and wholly supported by  
 9 the record. And it was far more than adequate under the deferential standard. *See, e.g., Kode v.*  
 10 *Carlson*, 596 F.3d 608, 612 (9th Cir. 2010) (noting that discretion permits “a broad range of  
 11 possible conclusions”); *Hinkson*, 585 F.3d at 1262 (confirming that the reviewing court may not  
 12 simply “substitute [its] view” for that of the decision maker); *Harman v. Apfel*, 211 F.3d 1172  
 13 (9th Cir. 2000) (permitting reversal under abuse of discretion “only when” the reviewing court is  
 14 convinced “firmly” that the decision “lies beyond the pale of reasonable justification under the  
 15 circumstances.”).

16 Because the Special Master’s conclusions were based on an accurate interpretation of the  
 17 law and an appropriate application of that law to the facts of this case, the R&R should be  
 18 adopted in its entirety.

19 **II. The Interim Special Master Applied the Appropriate Legal Standard to the DAPs’  
 20 Motion for Leave to Amend**

21 There is no serious dispute about the legal standard governing the DAPs’ motion to  
 22 amend. As the Interim Special Master confirmed,

23 Leave to amend shall be granted freely “when justice so requires.”  
 24 Fed. R. Civ. P. 15(a). This policy is applied “with extreme  
 25 liberality” in the Ninth Circuit. *Eminence Capital, LLC v. Aspeon,  
 Inc.*, 316 F.3d 1048, 1051 (9th Cir. 2003). The policy of liberality  
 26 applies whether the amendment will “add new causes of actions or  
 27 parties.” *DCD Programs, Ltd v. Leighton*, 833 F.3d 183, 186 (9th  
 Cir. 1987). Where the amendment seeks to add new parties, it must  
 also satisfy the joinder requirements of Rule 20(a), but those also  
 are to be applied liberally [*Matthews Metals Prods., Inc. v. RBM  
 Precision Metal Prods., Inc.*, 186 F.R.D. 581, 583 (N.D. Cal.

1999)], and are easily satisfied here since the claims against the potential new parties are identical to those against other defendants.

Leave to amend shall be granted absent undue delay, bad faith or dilatory motive on the part of the moving party, prejudice to the nonmovant or futility of the amendment. *Foman v. Davis*, 371 U.S. 178, 182 (1962). Of these “Foman factors” the most important is the presence or absence of prejudice. *Eminence Capital*, 316 F.3d at 1048.

The burden on showing prejudice from a proposed amendment rests on the non-moving party. *DCD Programs, Ltd v. Leighton*, 833 F.2d 183, 186-7 (9th Cir. 1987).

R&R at 4; *see also Howey v. United States*, 481 F.2d 1187, 1190–91 (9th Cir. 1973) (“Where there is lack of prejudice to the opposing party and the amended complaint is obviously not frivolous, or made as a dilatory maneuver in bad faith, it is an abuse of discretion to deny such a motion.”).

### **III. The Interim Special Master Correctly Concluded that Thomson and Mitsubishi Failed to Establish Undue Prejudice.**

The Interim Special Master correctly held that neither Thomson nor Mitsubishi satisfied their burden of showing that they would suffer undue prejudice as a result of being added to the DAP actions. Indeed, the Interim Special Master appropriately concluded that there was “*absolutely no persuasive basis* on which to find that Thomson has satisfied its burden to show that it would be unduly prejudiced by allowing the requested amendments.” R&R at 7 (emphasis added). The Special Master found persuasive the fact that Thomson had already been named a defendant by another party in the MDL and will have to proceed in the litigation regardless of the DAPs’ motion. *Id.* at 6–7. Moreover, the Interim Special Master found it significant that Thomson had known about the CRT actions since at least 2008 and had even entered into a tolling agreement with the IPPs in 2011, which required that Thomson preserve its relevant documents. *Id.* Similarly, the Interim Special Master confirmed that “Mitsubishi is not in a materially different position now than it was when Judge Legge made his recommendation [to grant the IPPs’ motion to add Mitsubishi to the IPP actions].” *Id.* When the IPPs moved to add Mitsubishi to their complaint last fall, Special Master Legge rejected the same prejudice arguments that Mitsubishi asserts again here. Accordingly, the Interim Special Master concluded

1 that “Mitsubishi has not satisfied its burden to demonstrate undue prejudice.” *Id.* Nothing in the  
 2 Interim Special Master’s R&R suggests that those conclusions were implausible, illogical, or  
 3 unsupported by inferences that may be drawn from the record. And nothing in the R&R remotely  
 4 suggests that the Interim Special Master’s analysis “lies beyond the pale of reasonable  
 5 justification under the circumstances,” particularly when Special Master Legge had come to the  
 6 same conclusion this past November.

7       Nonetheless, as they did in their opposition to the DAPs’ motion for leave to amend,  
 8 Thomson and Mitsubishi again argue that they would be unduly prejudiced by their inclusion in  
 9 the MDL simply because they would have to defend themselves in the litigation—a basic duty  
 10 required of all civil defendants. For example, Thomson complains that it will have to “file and  
 11 litigate both entities’ motions to dismiss”; “identify, locate, contact and interview former  
 12 Thomson personnel who may have knowledge concerning the DAPs’ claims”; and “meet and  
 13 confer regarding the DAPs’ discovery responses and file any necessary motions to compel.”  
 14 Thomson Obj. at 5. Such basic litigation requirements are hardly prejudicial, let alone “unduly”  
 15 prejudicial, and the current scheduling order allows ample time to complete these tasks.

16       Moreover, because Thomson was named as a defendant in a complaint filed by Sharp  
 17 Electronics Corporation, Thomson will be required to perform these litigation duties even absent  
 18 the DAPs’ motion. *See* R&R at 6 (“Thomson’s outsider status ended in March 2013 when Sharp  
 19 named it in its DAP opt-out complaint. Therefore, regardless of whether this motion is granted,  
 20 Thomson is a defendant in the DAP cases, and will face the same discovery obligations and the  
 21 same trial date.”); Complaint, *Sharp Electronics Corp. v.Hitachi, Ltd. et al.*, No. 3:13-cv-01173-  
 22 SC, Dkt. No. 1 (N.D. Cal. Mar. 15, 2013) (naming as defendants Thomson SA (N/K/A  
 23 Technicolor SA) and Thomson Consumer Electronics, Inc. (N/K/A Technicolor USA, Inc.)).  
 24 Indeed, the Interim Special Master concluded that because Thomson was already a named  
 25 defendant in the MDL, Thomson retained *no credible argument* that it would be unduly  
 26 prejudiced by being added as a defendant to the other DAP actions. *See* R&R at 7 (“The naming  
 27 of Thomson as a defendant in the Sharp action removed any credible argument that Thomson  
 28

1 would be unduly prejudiced by being added as a defendant to these other DAP actions.”).

2       The same is now true of Mitsubishi, which has been named as a defendant by plaintiff  
 3 Dell, and thus will be required to participate in this litigation regardless of the outcome of this  
 4 motion. *See* Dell Amended Complaint, Dkt. 1725 (June 10, 2013) (naming as defendants  
 5 Mitsubishi Electric Corp., Mitsubishi Digital Electronics Corp., Mitsubishi Digital Electronics  
 6 America, Inc., and Mitsubishi Electric & Electronics, USA, Inc.).

7       Thomson attempts to discredit the Interim Special Master by arguing that he failed to  
 8 adequately consider that Thomson’s inclusion in the DAP actions would require it to defend itself  
 9 in multiple actions rather than one. Thomson Obj. at 7–8. But the Interim Special Master  
 10 explicitly considered that argument and logically and reasonably rejected it, concluding that  
 11 although defending against multiple actions would necessarily add some burden, that burden  
 12 would be “greatly lessened” because those other actions “are part of a coordinated MDL  
 13 proceeding.” R&R at 7. Thomson also claims that being named by additional DAPs will  
 14 increase its potential liability for the damages it allegedly caused. Although this is true, it is  
 15 simply not the sort of prejudice—let alone *undue* prejudice—that Rule 15 forbids.

16       Despite their protests, Thomson and Mitsubishi will no doubt *benefit* from  
 17 many of the MDL litigation activities that have already transpired and to which they expended no  
 18 time or money. For example, crucial protocols have already been debated and implemented,  
 19 including a protocol regarding proceedings before the Special Master, a custodian-based  
 20 discovery protocol, an ESI protocol, a deposition protocol, and a protocol regarding translations.  
 21 A protective order and a pre-trial schedule coordinating all plaintiffs also are in place. In  
 22 addition, Thomson and Mitsubishi will have immediate access to discovery information already  
 23 produced. Just as Thomson argued that “[t]he DAPs have benefited from the existing discovery  
 24 in the Class Actions,” Thomson Opp. at 3, and so too would Thomson and Mitsubishi benefit  
 25 from the coordinated efforts. That Thomson and Mitsubishi will be able to take advantage of the  
 26 considerable work already accomplished—at no financial or temporal burden to them—will  
 27 undoubtedly work to their advantage.

28

1           Furthermore, although the case has moved forward since the DAPs initially moved to  
 2 amend, discovery is still in its early stages. Just as was the case when the motion was originally  
 3 filed, the DAPs are in the process of producing documents, and only two 30(b)(6) depositions  
 4 (and no merits depositions) of the DAPs have taken place. As for discovery of the existing  
 5 Defendants, many merits depositions are scheduled to take place later in 2013 or have yet to be  
 6 scheduled at all. The handful of depositions that have taken place to date have been zealously  
 7 defended by competent counsel for Defendants. Those Defendants no doubt share Thomson and  
 8 Mitsubishi's interest in minimizing testimony about the alleged cartel's activities. *See Amended*  
 9 *Report on IPP Motion to Amend Complaint*, Dkt. No. 1453 at 3 (Nov. 19, 2012) ("[N]umerous  
 10 other defendants' counsel have been representing the defense interests throughout the court of this  
 11 litigation[, giving] some assurance that the case has been and is being defended up to this time.").  
 12 In any event, as current parties to the MDL proceedings, Thomson and Mitsubishi are fully  
 13 capable of participating in the ongoing discovery of Defendants and DAPs alike.

14           Similarly, the Interim Special Master rejected Thomson and Mitsubishi's argument that  
 15 they would be unduly prejudiced because of the alleged difficulty in locating witnesses and  
 16 documents. Thomson complains, for example, that because it sold its business in 2005 and  
 17 because most of its documents are located in France, "Thomson will face extreme complications  
 18 in retrieving them." Thomson Obj. at 7. Mitsubishi likewise argues that it would be unduly  
 19 prejudiced at this time because the conspiratorial conduct occurred "nearly 20 years ago,"  
 20 apparently making it difficult to locate relevant evidence. Mitsubishi Obj. at 5. Yet whether the  
 21 DAPs included Thomson and Mitsubishi in their November 2011 complaints or add them now  
 22 has no bearing on whatever difficulty those entities may have in locating evidence created years  
 23 earlier. Moreover, the Interim Special Master explained that Thomson has known about the CRT  
 24 action for nearly five years since it was originally named by the IPPs and DPPs, so it would long  
 25 ago have preserved relevant documents. R&R at 7. The Interim Special Master likewise  
 26 concluded that because Thomson and Mitsubishi signed tolling agreements with the IPPs in 2011,  
 27 each proposed defendant "will have preserved its relevant documents," eliminating any undue  
 28

1 prejudice that might otherwise have existed. In addition, both the IPP and DPP consolidated  
 2 complaints, as well as the DAP complaints, allege that the various plaintiffs might name as  
 3 defendants additional co-conspirators, including Mitsubishi specifically, giving the parties  
 4 sufficient notice of such claims. *See, e.g.*, Costco Complaint ¶ 58 (naming Mitsubishi as a co-  
 5 conspirator and reserving the right to name it and other co-conspirators as defendants).

6         The Interim Special Master also correctly rejected Thomson and Mitsubishi's complaints  
 7 about the adequacy of the case schedule. In earlier recommending that the Court grant the IPPs'  
 8 motion to amend to add Mitsubishi, Special Master Legge concluded that the IPPs "have met the  
 9 standards for the addition of the Mitsubishi defendants, and their addition at this time will not be  
 10 unduly prejudicial to Mitsubishi in its defense of this action." Amended Report on IPP Motion to  
 11 Amend Complaint, Dkt. No. 1453 at 3 (Nov. 19, 2012). Because the Court subsequently  
 12 amended the scheduling order (Dkt. No. 1595), none of the substantive timelines that affect  
 13 Mitsubishi or Thomson are materially different from when the IPPs moved to amend, a fact the  
 14 Interim Special Master found persuasive. *See R&R* at 7 ("Judge Legge fully considered the issue  
 15 of prejudice in November 2012, and determined that Mitsubishi would not be unduly prejudiced  
 16 by being added as a party. Since the case management schedule has been adjusted since then to  
 17 defer various deadlines, Mitsubishi is not in a materially different position now than it was when  
 18 Judge Legge made his recommendation."). When the IPPs moved in August 2012, one year  
 19 remained before the end of fact and expert discovery. Now, fact and expert discovery closes in  
 20 March 2014, one year after the DAPs sought leave to amend. Similarly, when the IPPs moved for  
 21 leave to amend, trial was to begin nineteen months later. Now, trial (for those DAPs not  
 22 returning to other districts) is scheduled for October 2014, more than eighteen months after the  
 23 DAPs sought leave to amend. What is more, the subsequent naming of Thomson and Mitsubishi  
 24 in other plaintiffs' actions means that both are *already* participating in the litigation; the Thomson  
 25 defendants, for example, have already filed motions to dismiss Sharp's complaint. *See* Dkt.  
 26 Nos. 1677 & 1765. Accordingly, neither Thomson nor Mitsubishi will be starting at "square one"  
 27  
 28

1 when the amended DAP complaints are filed. Just as the would-be defendants faced no undue  
 2 prejudice at the time of the IPPs' motion, they face no prejudice here.<sup>4</sup>

3 Thomson and Mitsubishi further rely in their objections—as they did in response to the  
 4 IPP motion before Special Master Legge and in response to the DAP motion before Interim  
 5 Special Master Quinn—on Judge Illston's ruling in the LCD litigation denying in part a motion  
 6 for leave to add certain parties. *See* Thomson Obj. at 2; Mitsubishi Obj. at 7. Yet Thomson and  
 7 Mitsubishi ignore the critical fact that the motion to amend in LCD, unlike the instant motion,  
 8 was filed by the class plaintiffs *after class certification*. Indeed, Judge Illston explained that  
 9 “adding these entities as defendants might require revisiting class certification to address issues  
 10 specific to these entities.” *In re TFT-LCD (Flat Panel) Antitrust Litig.*, No. 3:07-md-1827-SI  
 11 (N.D. Cal. Apr. 12, 2011) (Dkt. No. 2641 at 1–2). Class certification is not at issue here, and the  
 12 Interim Special Master found that distinction critical: “In the LCD case, Judge Illston denied a  
 13 motion to add Mitsubishi as a defendant, but did so in part because the motion came after the  
 14 classes had been certified, and adding Mitsubishi might require reopening that issue.” R&R at 6  
 15 n.6.

16 Finally, the cases upon which Thomson and Mitsubishi rely present significantly  
 17 different—and often egregious—circumstances that are absent here. *See, e.g., Netbula, LLC v.*  
*Bindview Dev. Corp.*, No. C06-00711 MJJ, 2007 WL 2221070, at \*6 (N.D. Cal. Aug. 2, 2007)  
 19 (proposed amendments “come *after the close of discovery* and involve adding an additional 400  
 20 unnamed Doe defendants, *asserting two new claims*, and alleging a number of factual allegations”  
 21 (emphasis added)); *AmerisourceBergen Corp. v. Dialysisist W., Inc.*, 465 F.3d 946, 953 (9th Cir.  
 22 2006) (“Allowing AmerisourceBergen to ‘*advance different legal theories and require proof of*  
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24           <sup>4</sup> The Court should likewise reject Thomson’s assertion that the case schedule should be amended  
 25 if Thomson is added to the DAP actions. The Interim Special Master already concluded that the DAPs’  
 26 motion for leave to amend should be granted under the current schedule (just as Special Master Legge  
 27 recommended that Mitsubishi be added to the IPP complaint under the same analogous schedule), and that  
 28 decision was logical, plausible, and supported by inferences that may be drawn from the record.  
 Furthermore, Thomson is already a defendant in the MDL under the current case schedule, and there is no  
 reason to extend that schedule simply because Thomson will have to defend itself against other MDL  
 participants.

1        *different facts*' at this stage in the litigation would have prejudiced Dialysist West . . . ." (emphasis added)); *Jackson v. Bank of Haw.*, 902 F.2d 1385, 1388 (9th Cir. 1990) ("To permit the  
 2        amended complaint would require appellees to relitigate a portion of their state court action with  
 3        their insurer *on the different theories . . .*" (emphasis added)); *Morongo Band of Mission Indians v. Rose*, 893 F.2d 1074, 1079 (9th Cir. 1990) ("The *new claims* set forth in the amended  
 4        complaint would have greatly altered the nature of the litigation and would have required  
 5        defendants to have undertaken, at a late hour, *an entirely new course of defense.*" (emphasis  
 6        added)); *Wells Fargo Bank, N.A. v. Renz*, No. C 08-02561 SBA, 2010 WL 2867615, at \*3–4 (N.D. Cal. July 20, 2010) (denying a *third motion to amend* to add a party where depositions had  
 7        already been taken and the discovery deadline was only five months away); *Scognamillo v. Credit Suisse First Boston, LLC*, 587 F. Supp. 2d 1149, 1156 (N.D. Cal. 2008) (denying leave filed "late  
 8        in litigation" and involving "new theories" representing a "radical departure" from the  
 9        complaint).

10        The Interim Special Master's conclusion that both Thomson and Mitsubishi failed to meet  
 11        their burden of showing undue prejudice was credible, persuasive, and overwhelmingly supported  
 12        by the record before him. The Interim Special Master's R&R is a textbook example of the  
 13        exercise of sound discretion, and it should be adopted in its entirety.

14        **IV. The Interim Special Master Correctly Concluded that Thomson and Mitsubishi Failed to Establish Undue Delay.**

15        The Interim Special Master's conclusion that neither Thomson nor Mitsubishi would  
 16        suffer any undue prejudice from the amended complaints should all but end the inquiry. *See*  
 17        *Eminence Capital, LLC*, 316 F.3d at 1052 ("Prejudice is the touchstone of the inquiry under rule  
 18        15(a)." (internal quotations omitted)); R&R at 4 ("Of the 'Foman factors' the most important is  
 19        the presence or absence of prejudice."). Knowing that they cannot prove undue prejudice,  
 20        Thomson and Mitsubishi assert that the DAPs unduly delayed filing their motion to amend. Yet  
 21        the Ninth Circuit has repeatedly held that "delay alone is not sufficient to justify the denial of a  
 22        motion requesting leave to amend." *DCD Programs, Ltd. v. Leighton*, 833 F.2d 183, 187 (9th  
 23        Cir. 1987); *see also Bowles v. Reade*, 198 F.3d 752, 758 (9th Cir. 1999) (same); *Hurn v. Ret.*  
 24

1     *Fund Trust of Plumbing, Heating & Piping Indus. of S. Cal.*, 648 F.2d 1252, 1254 (9th Cir. 1981)  
 2     (same); *Howey v. United States*, 481 F.2d 1187, 1190 (9th Cir. 1973) (“[W]e know of no case  
 3     where delay alone was deemed sufficient grounds to deny a Rule 15(a) motion to amend.”).<sup>5</sup> In  
 4     any event, the Interim Special Master also correctly concluded that Defendants have not met their  
 5     burden of proving that the DAPs unduly delayed moving to amend.

6                 The Interim Special Master explained that there are two periods of purported delay at  
 7     issue: The first is the time between November 2011, when the DAPs filed their original  
 8     complaints, and August 2012, when the DAPs were alerted by the IPP motion to amend of  
 9     Mitsubishi and Thomson’s potential involvement in the conspiracy. R&R at 5. The second is the  
 10    time between August 2012, when the IPPs moved to amend, and March 2013, when the DAPs  
 11    moved to amend. *Id.* The Interim Special Master properly concluded that justification for the  
 12    first time period “was largely answered as to Mitsubishi and Thomson by Judge Legge’s Report  
 13    in which he recommended that the IPPs be permitted to add Mitsubishi as a defendant.” *Id.* In  
 14    that report, Judge Legge found that “[IPPs] have been diligent in seeking the amendment because  
 15    they only recently discovered” the relevant documents. *Id.* As the Interim Special Master  
 16    explained,

17                 If it was reasonable for the IPPs to delay until August 2012 to  
 18    appreciate Mitsubishi’s involvement in the alleged conspiracy, *no reason is suggested as to why it was not also reasonable* for the  
 19    DAPs to be unaware until then of Mitsubishi’s involvement. *The DAPs presented credible evidence* that they were “prompted by”  
 20    the IPPs’ motion to amend, that they began “targeted review of  
 21    document productions for evidence of Thomson, Videocon and  
 22    Mitsubishi participation in the conspiracy,” that they discovered  
 23    such evidence and also took account of the EU fine against  
 24    Thomson, and that they filed this motion within a month after  
 25    reviewing the relevant documents.

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26                 <sup>5</sup> Although the Ninth Circuit has suggested that undue delay alone may be sufficient to deny leave  
 27    to amend, *see McGlinch v. Shell Chemical Co.*, 845 F.2d 802, 809 (9th Cir. 1988) (“‘Undue delay’ is one  
 28    valid reason for a district court to deny a party leave to amend.”), the DAPs are aware of no Ninth Circuit  
 29    decision where delay alone justified denying a motion to amend. *See Howey*, 481 F.2d at 1190 (explaining  
 30    that it knows of no decision relying exclusively on undue delay). Regardless, any discrepancy in the  
 31    court’s holdings simply reinforces the emphasis all courts have placed on prejudice (or lack thereof) as the  
 32    decisive factor when evaluating motions to amend.

1       *Id.* (emphasis added). The Interim Special Master therefore held that “[n]o persuasive reason is  
 2 presented for coming to a conclusion different as to Mitsubishi and Thomson than Judge Legge  
 3 did as to Mitsubishi last year.” *Id.*

4       Likewise, the Interim Special Master sensibly concluded that the purported delay from the  
 5 time the DAPs were alerted to the evidence against Thomson and Mitsubishi and the time they  
 6 filed their motion to amend was entirely justified: “DAPs reasonably assert that they were  
 7 performing due diligence by reviewing documents to assure themselves that there was an  
 8 adequate basis to seek to add Mitsubishi (and Thomson) as defendants. The mere speculation that  
 9 they might have completed that review and filed this motion 2-3 months sooner is not an adequate  
 10 basis to demonstrate undue delay.” *Id.*

11      Thomson and Mitsubishi argued that the DAPs should have moved at the same time as the  
 12 IPPs moved to amend. Thomson Opp. at 11; Mitsubishi Opp. at 8–9. But as Thomson and  
 13 Mitsubishi concede in their opposition briefs, the IPPs did not cite any particular documents in  
 14 their motion or supporting declaration. Thus, the DAPs had no independent basis to make similar  
 15 allegations about Thomson and Mitsubishi. A delay between the IPPs’ motion and any DAP  
 16 motion was inevitable given the DAPs’ duty under the Federal Rules to perform their own  
 17 reasonable investigation into the allegations, which investigation revealed that the allegations  
 18 against Thomson and Mitsubishi were factually supported.

19      Moreover, the DAPs have been involved in this litigation for far less time than the IPPs  
 20 and DPPs and, consequently, have not conducted as much discovery review or developed  
 21 sophisticated document databases. The Interim Special Master agreed that the DAPs took a  
 22 reasonable amount of time not only to locate the documents on which the IPPs relied but also to  
 23 confirm the substance of those documents and locate additional evidence implicating Thomson  
 24 and Mitsubishi. Following their reasonable investigation, the DAPs moved to amend promptly.  
 25 Furthermore, it was in the best interests of the Court and parties for the DAPs to file a single,  
 26 consolidated motion to amend, rather than having dozens of separate plaintiffs, represented by  
 27 several law firms, file individual motions with different briefing schedules and deadlines.

1 Coordination between the DAPs, which takes a reasonable amount of time, does not constitute  
 2 “undue” delay.

3 Ultimately, the DAPs did not rely exclusively on the evidence on which the IPPs relied.  
 4 Instead, and contrary to Thomson and Mitsubishi’s assertions, the DAPs discovered additional  
 5 evidence to support their allegations. In addition to independently confirming that Thomson  
 6 attended dozens of meetings with its competitors, including Glass Meetings, and that Mitsubishi  
 7 attended multiple bilateral meetings with its competitors, the DAPs relied on the European  
 8 Commission’s December 2012 report confirming that it had fined Thomson over € 38 million for  
 9 participating in the CRT conspiracy—a report that was disclosed four months *after* the IPPs filed  
 10 their motion. Thus, the DAPs could not have filed their motion to amend on the heels of the  
 11 IPPs’ motion.

12 For those reasons, the Interim Special Master properly concluded that Thomson and  
 13 Mitsubishi failed to meet their burden of showing that the DAPs unduly delayed moving to  
 14 amend. Therefore, the Court should adopt the Interim Special Master’s recommendation that  
 15 DAPs be granted leave to amend their complaints to add Thomson and Mitsubishi.

16 **V. The Court Should Adopt All Unopposed Portions of the Interim Special Master’s  
 17 Report and Recommendation**

18 The Court should also adopt all of the unopposed portions of the Interim Special Master’s  
 19 R&R. In addition to recommending that the Court grant DAPs leave to add Thomson and  
 20 Mitsubishi as defendants, the Interim Special Master also recommended that the Court grant  
 21 DAPs leave to add the following:

- 22 1. Videocon Industries, Ltd., as a non-party co-conspirator;
- 23 2. Samsung SDI Co., Ltd., Samsung SDI America, Inc., Samsung SDI  
   Mexico S.A. de C.V., Samsung SDI Brazil Ltda., Shenzhen Samsung  
   SDI Co., Ltd., Tianjin Samsung SDI Co., Ltd., and Samsung SDI  
   (Malaysia) Sdn. Bhd. as new defendants in the case of Costco only.
- 24 3. Panasonic Corp., Panasonic Corp. of North America, MT Picture  
   Display, Co., Ltd., Matsushita Electronic Corp. (Malaysia) Sdn. Bhd.  
   and Panasonic Consumer Electronics Co. as non-party co-conspirators  
   in the case of Costco only.

- 1           4. Additional allegations relevant to *American Pipe*, cross-jurisdictional,  
 2           and Government Action tolling, as well as to remove a few minor  
 3           allegations in particular complaints.

3           *Id.* at 8.

4           No defendants or purported defendants, including the Samsung SDI defendants, filed any  
 5           objection to those recommendations, and they have therefore waived any challenge to the Interim  
 6           Special Master's R&R. *See, e.g., Miranda v. Anchondo*, 684 F.3d 844, 848 (9th Cir. 2012)  
 7           ("([F]ailure to object to a magistrate judge's factual findings waives the right to challenge those  
 8           findings . . ."). Accordingly, the Court should also adopt all unopposed portions of the Interim  
 9           Special Master's R&R.

## CONCLUSION

11           For the reasons set forth in the Interim Special Master's Report and Recommendation and  
 12           the Direct Action Plaintiffs' motion and supporting documents, the Court should adopt the  
 13           Interim Special Master's Report and Recommendation in its entirety.

14           DATED: July 19, 2013

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